United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7222

~~76-8146~~

To be argued by:
SAMUEL N. GREENSPOON

B

P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN THE MATTER OF

GRAND BAHAMA PETROLEUM COMPANY, LIMITED,

Petitioner-Appellee,

—against—

ASIATIC PETROLEUM CORPORATION,

Respondent-Appellant.

APPELLEE'S BRIEF

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In the Matter of

Grand Bahama Petroleum
Company, Limited,

Petitioner-Appellee,

Docket No. 76-8146

-against-

Asiatic Petroleum Corporation,

Respondent-Appellant.

- -x

Appellee's Brief

Preliminary(1)

Grand Bahama Petroleum Company, Limited ("Petco"), a corporation organized and existing under the laws of the Commonwealth of the Bahamas (with its principal and sole place of business at Freeport, Bahamas), commenced this proceeding under 9 U.S.C. Secs. 1 et seq. to compel Asiatic Petroleum Corporation ("Asiatic"), a Delaware corporation (with its principal office in New York, New York) to arbitrate a dispute under a written arbitration contract between Petco and Asiatic evidencing a transaction in commerce.

(1) Figures in parenthesis refer to pages in joint appendix unless otherwise noted.

Asiatic asserted that the New York State door closing statute, B.C.L. Sec. 1312(a) barred Petco from commencing and prosecuting this proceeding, and sought discovery of some four or five witnesses as to whether or not Petco, which is not qualified to do business in New York, was in fact doing business in New York*. Doing business in New York at the time this proceeding was commenced without being qualified is a condition precedent to the application of B.C.L. Sec. 1312(a).

The Court below (Stewart, D.J.) ruled that 9 U.S.C. Secs. 1 et seq. created overriding federal substantive law, leaving no room for the application of local, provincial law, and that accordingly B.C.L. Sec. 1312(a) was inapplicable and could not close the door to the federal courts. The Court below so ruled even assuming that jurisdiction was predicated solely on diversity of citizenship and amount in controversy since concededly the contract at bar evidenced a transaction involving foreign commerce (9 U.S.C. Sec. 2).

The Court below accordingly did not reach the question of whether or not jurisdiction could be predicated on a federal question without regard to diversity of citizenship (183a). We submit that jurisdiction lies both on the basis of diversity of citizenship and on the basis of a proceeding arising under the

*
Asiatic has not produced any evidence that Petco is or was doing business in New York and the discovery to date negates any such contention.

laws of the United States. Hence, appellant's entire argument falls by the wayside, since concededly a local, provincial door closing statute cannot bar the door to the federal courts of a proceeding arising under the laws of the United States.

Counter-Statement of issues presented for Review

1. Where a party seeks to enforce a substantive federal right created by Congress, may the enforcement of such federal right in the federal Courts be frustrated by a local door closing statute (which is not jurisdictional), where jurisdiction of the federal Court is predicated on diversity of citizenship, amount in controversy and a contract evidencing a transaction in commerce?

The Court below held in the negative.

2. Where a party seeks to enforce a substantive federal right created by Congress, and where Congress has expressly provided that a proceeding to enforce such right shall be deemed to arise under the laws and treaties of the United States, and that the District Courts shall have original jurisdiction over such proceeding regardless of the amount in controversy, may a local or provincial door closing statute bar the enforcement of such right in the federal Courts?

The Court below did not reach this question.

Statement of the Case

The nature of the case in brief

Petco commenced this proceeding pursuant to 9 U.S.C. Secs. 1 et seq. to compel Asiatic to arbitrate certain claims asserted by Asiatic against Petco (3a-4a). These claims relate to three cargoes of oil which Petco acquired in September 1975 (10a). Petco refused to pay for these three cargoes of oil contending that the price was overstated and that in any event Asiatic (and its affiliates) owed to Petco substantially more than the proper or even the improper price which the vendors sought to charge for the three cargoes* (24a).

Petco is a corporation organized and existing under the laws of the Commonwealth of the Bahamas with its only office and place of business in Freeport, Bahamas (3a). Asiatic is a Delaware corporation with its principal office in New York (3a). The amount in controversy (exclusive of interest and costs) is far in excess of $10,000 (3a).

* Asiatic was the vendor of only one of the three cargoes. The other two cargoes were sold and delivered by Asiatic's affiliates as permitted under the contract.

The contract involved herein is an international contract between a citizen of a foreign country and an American citizen. The contract provides for the sale by Asiatic (or by an Asiatic affiliate, either a Venezuelan corporation or a Netherlands Antilles corporation) to Petco of No. 6 fuel oil to be lifted by Petco either in Venezuela, the Netherlands Antilles or Trinidad (32a-41a; 35a). The contract thus indisputably evidences a transaction involving foreign commerce.

The contract also provides that any dispute arising thereunder shall be settled by arbitration before the American Arbitration Association in New York City, New York (41a).

Accordingly, since the contract evidences a transaction involving commerce and contains a written provision to settle by arbitration any controversies arising out of such contract, it is a contract which falls squarely within 9 U.S.C. Sec. 2.

By the same token since the contract involved is clearly considered as commercial under United States law, and is between a citizen of a foreign country and a citizen of the United States, it falls within Article II of the Convention on the Recognition and Enforcement of Foreign Arbitrable Awards of June 10, 1958 9 U.S.C. Secs. 201, 202, 203 and 206.

The local or provincial statute, B.C.L. Sec. 1312(a) provides that a foreign corporation, not qualified to do business in the State of New York, and which is doing business in the State of New York, shall not maintain any action or special proceeding in this State until the foreign corporation qualifies to do business in New York, pays its franchise taxes and performs other acts. If this statute could bar the door to the Courts of the State of New York with respect to the transaction involved herein, which is solely in foreign commerce, nonetheless we submit that no matter upon what basis the jurisdiction of the District Court is invoked it cannot bar the door to the federal Courts.

We submit that the Court below properly ruled that Title 9 creates federal substantive law and that there is no room for the application of local, provincial laws which would bar the federal Courts from adjudicating federal rights, even though jurisdiction might be based on diversity of citizenship and amount in controversy.

As we have previously noted, the Court below did not reach the question of whether it had jurisdiction because of the existence of a federal question. But the District Court also has jurisdiction under 9 U.S.C. Sec. 203 and 28 U.S.C. Secs. 1331(a) and 1337 because the proceeding arises under the laws of the United States. We believe that the appellant concedes that where jurisdiction is predicated on 28 U.S.C. Sec. 1331(a) or 1337 local or

provincial law cannot be utilized to bar the door to the federal Courts. In any event, that is indisputably the law.

The Statutes Involved

9 U.S.C. Sec. 2 reads in its entirety as follows:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. Sec. 4 reads in pertinent part as follows:

> "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The Court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof."

9 U.S.C. Sec. 201 (Article II of the Convention of 1958) reads in part as follows:-

> "1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> "2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> "3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

9 U.S.C. Sec. 202 reads in its entirety as follows:-

> "An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship whichis entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States."

9 U.S.C. Sec. 203 reads in its entirety as follows:-

> "An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy."

9 U.S.C. Sec. 206 reads in its entirety as follows:-

> "A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement."

28 U.S.C.Sec. 1331(a) reads in its entirety as follows:-

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

28 U.S.C. Sec. 1337 reads in its entirety as follows:-

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

New York Business Corporation Law Section 1312(a) reads in its entirety as follows:-

> "A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees, penalties and franchise taxes for the years or parts thereof during which it did business in this state without authority. This prohibition shall apply to any successor in interest of such foreign corporation."

The Course of Proceedings

This proceeding was commenced by the filing and service of a notice of petition, petition, and supporting papers, on February 25, 1976 to compel Asiatic to arbitrate certain disputes which had arisen between Asiatic and Petco (1a). A few days prior thereto Asiatic had filed suit against Petco on the same claims in the United States District Court for the Southern District of Texas (10a; 92a-100a). In that suit Asiatic asserted that the Court had jurisdiction by reason of diversity of citizenship and amount in controversy (92a-93a).

Asiatic did not answer the petition and supporting papers. Instead it submitted what it called a notice of motion (184a), without any supporting papers or brief. In the so-called notice of motion it asserted, among other things, that B.C.L. Sec. 1312(a) barred this proceeding (184a). The failure to answer and the submission of the so-called notice of motion would appear to be unwarranted in law since a proceeding under 9 U.S.C. is

governed by the procedures applicable to a motion (9 U.S.C. § 6).

About the same time that Asiatic served its notice of motion, it also served notices to take the deposition of Petco, and of the President of New England Petroleum Corporation ("Nepco") the parent of Petco (131a; 146a). Those depositions have been concluded.

Asiatic then served notices to take the depositions of other Nepco officials and of a witness (147a; 148a). Petco moved to vacate those notices contending, inter alia, that no depositions should be permitted to inquire into whether or not Petco does business in New York since B.C.L. Sec. 1312(a) was not a defense to this proceeding in anyevent (142a-170a).

The Court below granted Petco's motion holding that B.C.L. Sec. 1312(a) was inapplicable because this proceeding was governed exclusively by federal law to the exclusion of state law (180a). Accordingly, the Court below quashed the notices to take depositions and denied the motion to dismiss the petition (187a).

Asiatic moved below for reconsideration or in the alternative for certification pursuant to 28 U.S.C. §1292(b) (188a). The Court below granted reconsideration but reaffirmed its prior order (188a); but granted certification pursuant to 28 U.S.C. §1292(b); this Court granted leave to appeal.

The Facts

The present dispute between the parties arose when Petco discovered that Asiatic and its affiliates had overcharged Petco through the guise of so-called host government take increases (23a-24a). Accordingly, Petco withheld payment for three shipments of oil, not only because the invoices therefor were substantially overstated through improper host government take increases but because Asiatic and its affiliates owed to Petco far more than the amount of the three invoices (23a-24a).

The contract between the parties is dated April 1, 1972 (32a). It provided that Asiatic shall sell to Petco and Petco shall purchase from Asiatic, 32,000 barrels per day of No. 6 fuel oil during the period April 1, 1972 through March 31, 1978 (32a). The contract further provided that the base price for the No. 6 fuel oil shall be $2.05 per barrel delivered F.O.B. Caribbean loading ports in accordance with Clause 6(a)* of the General Conditions of Sale, and subject to increase or decrease as specified in paragraph (d) (33a).

Paragraph (d) specified increases and decreases in the base price as determined by Venezuelan Host Government Take as defined in Clause 7(A) of the General Conditions of Sale (33a) Clause 7(A) defined Host Government Take ("HGT") in pertinent

* Clause 6(a) deals with testing of quality and quantity of the No. 6 fuel oil.

part as follows (38a):-

> "If at any time any governmental authority should charge any new or additional or increase any existing tax, charge, impost, duty or levy (including, but not limited to royalty payments) on or in respect of the Oil sold hereunder or on or in respect of the crude oil from which such Oil is derived. . ., or change the level or method of calculation of any tax, charge, impost, duty or levy now in force, or charge Sellers or Sellers' suppliers with any new or additional or an increase in any existing tax on or in respect of the proceeds of the sale of such Oil or the income therefrom, or change the level or method calculation of any such tax now in force, in such manner or such amount as would reduce the net income after taxes received by Sellers or Sellers' suppliers from the sale of such Oil, then Sellers may increase the price of the Oil to be sold hereunder by an amount per barrel which will offset fully the increased economic burden on Sellers or Sellers' suppliers applicable to the Oil to be sold hereunder."

The General Conditions of Sale expressly provided for arbitration of all disputes as follows (41a):-

> "Except as otherwise provided herein, any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in the City of New York, New York, in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof."

In September 1974, Asiatic demanded renegotiation of the price of the No. 6 fuel oil for the year 1975 (18a). In the last quarter of 1974, there were unconscionable demands by Asiatic for a substantial commercial increase in the price (unrelated to HGT), which Petco rejected (18a). By writing dated December 4, 1974, Asiatic advised Petco that it appeared unlikely that the parties would agree on a new price, and if no agreement was reached by December 31, 1974, Asiatic would terminate the contract effective March 2, 1975 (18a; 43a-44a).*

Accordingly, on December 18, 1974, Petco served a demand for arbitration of a dispute under the contract before the American Arbitration Association ("AAA") (19a). Petco asserted that Asiatic had failed to negotiate in good faith, that Asiatic had attempted to impose an unreasonable increase in price as a condition to continuation of the contract and that any attempted termination was thus null and void (19a-20a).

The arbitrators suggested that the parties enter into an interim arrangement pending and subject to their award under which Asiatic would continue deliveries of No. 6 fuel oil to Petco (21a; 58a-61a). Both parties accepted the suggestion and on February 28, 1975 dictated into the record a stipulation setting forth the terms and conditions under which Asiatic would

* The contract provided that if the parties could not agree to a new price then either party could terminate on 60 days' written notice (34a).

make deliveries to Petco of No. 6 fuel oil pending and subject to the award (21a; 61a-67a).

Problems arose under the stipulation dictated into the record on February 28, 1975 (22a; 68a-70a); and a second expedited session before the arbitrators was held on April 18, 1975 (22a). At that meeting various changes to the February 28, 1975 stipulation were agreed to and dictated into the record (22a). Subsequently, these various changes were incorporated into a writing dated April 28, 1975 and signed by the attorneys for the respective parties (73a-76a).

The writing dated April 28, 1975 expressly provided in the introduction thereof that it was "modifying the agreement entered by stipulation on February 28, 1975" (73a). Thus, except to the extent changed by the modification of April 28, 1975, the February 28, 1975 arrangement which made everything subject to the arbitrators' award, retroactive to midnight March 2, 1975, remained in full force and effect*.

Even if cargoes of oil involved herein which were lifted in September 1975 are not subject to the arbitrators' award and the contract dated April 1, 1972, arbitration is still required. Thus, the modification agreement dated April 28, 1975

*
The reason why we have explained in detail the events above and will further detail the events of that arbitration is because Asiatic has erroneously claimed that the three cargoes of oil involved herein are controlled by what it calls a Contract to Purchase Oil - i.e. the April 28, 1975 writing, without regard to the February 28, 1975 stipulation, the arbitrators' award and the contract dated April 1, 1972.

expressly provided (76a):

> "11. In the event that either petitioners or Asiatic fail to comply with any term or condition of this agreement the parties agree that any claim for damages or other relief by the other party may be submitted to the Panel of Arbitrators in this proceeding(which may include one or more successor arbitrators appointed pursuant to the Rules of the American Arbitration Association, should any member of the present Panel be unable to serve). Said Arbitrators shall have jurisdiction to hear and determine such claim and may render an award for damages, if any, together with interest and the fees and expenses of the Arbitrators and other taxable costs and disbursements relating to such proceeding."

Under date of October 22, 1975 the arbitrators rendered their award in the arbitration brought by Petco against Asiatic in which Petco claimed, among other things, that the purported termination of the contract dated April 1, 1972 was null and void and ineffective. The award completely substantiated Petco's claims and read in pertinent part as follows (24a-25a).

> "A. The termination by ASIATIC PETROLEUM CORPORATION, hereinafter referred to as RESPONDENT, OF THE Agreements dated April 1, 1972 between the Parties was not effective.
>
> "We therefore AWARD as follows:
>
> "1. RESPONDENT is directed to specifically perform the Agreements between the Parties as if there were no termination.
>
> "2. The price to be paid by NEW ENGLAND PETROLEUM CORPORATION and GRAND BAHAMA PETROLEUM COMPANY LTD., hereinafter referred to as CLAIMANTS, for the oil delivered in the calendar year 1975

pursuant to the Contracts dated on or about April 1, 1972 as amended, which are set forth as Exhibits A and B to the Stipulation of Fact, shall be the price set forth in paragraph 2(c) of the Particular Conditions of Sale under such Contracts subject to the provisions of paragraph 7 of the General Conditions of Sale."

Judgment on said award was entered in the Supreme Court, New York County (25a).

Thus, the following facts are indisputable:

(a) The three cargoes of oil lifted in September 1975 are controlled by the contract dated April 1, 1972;

(b) The contract dated April 1, 1972 is between a citizen of the United States (Asiatic) and a citizen of the Commonwealth of the Bahamas (Petco);

(c) The contract evidences a transaction in foreign commerce, to wit, sales of No. 6 fuel oil which were to be delivered to Petco in either Venezuela, the Netherlands Antilles, or Trinidad;

(d) The contract evidences a commercial arrangement to wit, the sale and purchase of No. 6 fuel oil.

Accordingly, the District Court had jurisdiction by reason of diversity of citizenship and also because this proceeding is deemed to arise under the laws and treaties of the United States, and hence jurisdiction is predicated under 9 U.S.C. Sec. 203 and 28 U.S.C. Secs. 1331 (a) and 1337.

I

B.C.L. Sec. 1312(a) is not a jurisdictional bar; even if jurisdiction is predicated solely upon diversity, state law and the Erie doctrine are inapplicable.

A. B.C.L. Sec. 1312(a) is not jurisdictional

The Court below properly ruled that compliance with B.C.L. Sec. 1312(a) is not a jurisdictional requirement; indeed, that section at most affects the legal capacity of a corporation to maintain the action or proceeding.

The Court below in ruling that B.C.L. Sec. 1312(a) was not jurisdictional stated (182a):-

> "It is unnecessary to look to state law for any purpose once jurisdiction has been obtained; and § 1312 is not a jurisdictional requirement. Hot Roll Mfg. Co. v. Cerone Equipment Co., 38 App. Div. 2d 339, 329 N.Y.S. 2d 466 (3d Dept. 1972)."

Hot Roll Mfg. Co. v. Cerone Equipment Co., 38 App. Div. 2d 339 (3d Dept. 1972) is the only appellate decision which we have found which considered whether or not B.C.L. Sec. 1312(a) was jurisdictional. In the Hot Roll case the plaintiff was a foreign corporation concededly doing business in New York without qualifying. It sued a New York resident in the New York Courts and obtained a default judgment. The

defendant moved to vacate the default judgment under CPLR 5015(a)(4) which authorizes the Courts to vacate a default judgment on the ground of lack of jurisdiction. The lower Court vacated the default judgment; the Appellate Division reversed and reinstated the default judgment, saying (p. 341 of 38 App. Div. 2d):-

> "Failure of a foreign corporation doing business in New York to comply with the requirements of subdivison(a) of section 1312 of the Business Corporation Law affects that corporation's legal capacity to maintain the action; it does not affect jurisdiction." (Emphasis supplied).

Legal capacity is of course controlled by Rule 17(b) FRCP. But that Rule refers the Court to the State of incorporation, in this case, the Bahamas, rather than the forum state, at least where federal law is in issue.*

B. The Erie doctrine is inapplicable; federal, not state, rights are here being adjudicated

Title 9 sets forth a complete body of substantive law resting on the Commerce Clause of the United States Constitution, and there is no room for application of any state law. As this Court made clear in Robert Lawrence Company v. Devonshire Fabrics, Inc., 271 F. 2d 402, 404-5 (2 Cir. 1959) cert. dism. 364 U.S. 801 (1960):-

*
R.V. McGinnis Theatres v. Video Independent Theatre, 386 F. 2d 592 (10 Cir. 1967) cert. den. 390 U.S. 1014 (1968) and Brody v. Chemical Bank, 482 F. 2d 1111 (2 Cir. 1973) cert den. 414 U.S. 1104 (1973) (Asiatic Br. p. 12) referred to the law of the state of incorporation not that of the forum state.

> "we find a reasonably clear legislative intent to create a new body of substantive law relative to arbitration agreements affecting commerce or maritime transactions. Thus we think we are here dealing not with state-created rights but with rights arising out of the exercise by the Congress of its constitutional power to regulate commerce and hence there is involved no difficult question of constitutional law under Erie."

And as Judge Gurfein held in Lawn v. Franklin, 328 F. Supp. 791, 794 (S.D.N.Y. 1971):-

> "It is unnecessary, however, to determine this question of fact since the State statute cannot in any event prevail over the Federal Arbitration Act. That Act created Federal substantive law and the doctrine of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) is not applicable."

See also Joseph Muller Corp. Zurich v. Commonwealth Petrochem, 334 F. Supp. 1013, 1018 (S.D.N.Y. 1971); Younker Brothers, Inc. v. Standard Const., 241 F. Supp. 17, 18 (S.D. Iowa 1965).

The sharp distinction between the enforcement of state created rights which were involved in Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Guaranty Trust Co. of New York v. York, 326 U.S. 99 (1945) and other cases cited by appellant, and cases where federally created rights are involved, as is the case here, was

made clear by the United States Supreme Court in Holmberg v. Armbrecht, 327 U.S. 392 (1946) and by this Court in Austrian v. Williams, 198 F. 2d 697 (2 Cir. 1952) cert den. 344 U.S. 909 (1952).

Thus, in distinguishing Guaranty Trust Co. v. York, the Supreme Court stated in Holmberg v. Armbrecht, supra (p. 394 of 327 U.S.):-

> "But in the York case we pointed out with almost wearisome reiteration, in reaching this result, that we were there concerned solely with State-created rights. For purposes of diversity suits a federal court is, in effect, 'only another court of the State.' Guaranty Trust Co. v. York, supra, at 108 The considerations that urge adjudication by the same law in all courts within a State when enforcing a right created by that State are hardly relevant for determining the rules which bar enforcement of an equitable right created not by a State legislature but by Congress."

We have here as in Holmberg a federal Court which has been set in motion to adjudicate federally created rights. These federally created rights are to be adjudicated uniformly no matter in which district court the right is asserted. The District Court did not sit here as merely another Court of the State but sat under the mandate of Congress to enforce Title 9 on the basis of a national uniformity without regard to local, provincial law irrespective of how the jurisdiction of the District Court was invoked.

As was stated in Holmberg, supra (p. 395 of 327 U.S.):-

> "The present case concerns not only a federally-created right but a federal right for which the sole remedy is in equity. Wheeler v. Greene, 280 U.S. 49; Christopher v. Brusselback, 302 U.S.500; Russell v. Todd, 309 U.S. 280, 285. And so we have the reverse of the situation in Guaranty Trust Co. v. York, supra. We do not have the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress."

C. The Federal Arbitration Act bars application of B.C.L. Sec. 1312(a) even though jurisdiction is based on diversity

The Act is a comprehensive statute governing all maritime contracts and all contracts evidencing transactions in commerce, such as the contract at bar. Hence once jurisdiction and venue are established in accordance with 9 U.S.C. § 4, the only questions which the Court may consider are those set forth in Section 4 and none of such questions, as the Court below held (182a), is referrable to state law.

9 U.S.C. Sec. 4 says in plain language:

"The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."

As was stated in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-4):-

"With respect to cases brought in federal court involving maritime contracts or those evidencing transactions in 'commerce', we think that Congress has provided an explicit answer. That answer is to be found in § 4 of the Act, which provides a remedy to a party seeking to compel compliance with an arbitration agreement. Under § 4 with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue.' * * * Section 4 does not expressly relate to situations like the present in which a stay is sought of a federal action in order that arbitration may proceed. But it is inconceivable that Congress intended the rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court. We hold, therefore, that in passing upon a §3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." (Emphasis supplied).

And in Commonwealth Edison Co. v. Gulf Oil Corp., 400 F. Supp. 888 (N.D. Ill. 1975), which was a Section 4 case, the Court held that the federal Court may consider only issues relating to the making and performance of the agreement to arbitrate. The Court there said (p. 890):-

> "Section Four of the federal arbitration statute (9 U.S.C. § 4) provides that a district court judge shall order the parties to arbitrate once he is satisfied that the making of the arbitration agreement and the failure to comply with it are not in issue, I believe that such is the case here; all parties agree that the agreement here was entered into by the litigants and nobody disputes the fact that one party is unwilling to commence arbitration proceedings. Precedent indicates that this is all that the district court should consider in ruling on this issue. The Supreme Court stated: '. . . a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.' Prima Paint Corp. v. Flood & Conklin Mfg. Co., supra, 388 U.S. at 404, 87 S. Ct. at 1806. Accord, Halcon International, Inc. v. Monsanto Australia, Ltd., 446 F. 2d 156 (7th Cir. 1971). Cf. Island Territory of Curacao v. Solitron Devices, Inc., 356 F. Supp. 1 (S.D.N.Y. 1973), affd. 489 F. 2d 1313 (2d Cir. 1973) cert. denied 416 U.S. 986, 94 S. Ct. 2389, 40 L. Ed. 2d 763 (1974)."

In other words, once the jurisdictional key is found to unlock the door of the federal Court, the Court is limited by express statutory mandate to consider only two issues, to wit, issues relating to the making and performance of the agreement to arbitrate. All other issues are out of the case and this plain mandate of federal law makes inapplicable any provision of state law no matter what its nature.

Under Asiatic's thesis Section 4 could become a dead letter by reason of state law, and there could be no way to compel arbitration even though Congress has exercised its exclusive power to legislate with respect to contracts evidencing transactions in commerce. This is so because only the United States District Court for the Southern District of New York (and for no other district) can compel arbitration under Chapter 1 of Title 9 since the contract provides for arbitration in New York City. Econo-Car Int'l. Inc. v. Antilles Car Rentals, Inc., 499 F. 2d 1391 (3 Cir. 1974); Lawn v. Franklin, 328 F. Supp. 791 (S.D.N.Y. 1971).

Indeed, the force of Chapter 1 of Title 9 is so strong that it overrides the door closing effect of the State's common law immunity to suit. Thus, in Litton R.C.S. Inc. v. Penn Tpke, Commission, 376 F. Supp. 579 (E.D. Pa. 1974) affd. 511 F. 2d 1394 (3 Cir. 1975) the respondent Commission contended that the State doctrine of sovereign immunity precluded enforcement against it in the federal courts of an arbitration contract evidencing a transaction in commerce. The District Court said in rejecting the notion of such common law immunity from suit (p. 588 of 376 F. Supp.):-

> "Implications arising from state doctrines of common law sovereign immunity will not overrule the strong federal policy contained in § 1 of the U.S. Arbitration Act that contracts to arbitrate are valid, irrevocable and enforceable."

The District Court further explained its holding as follows (ftn. 18, p. 589):

> "The policies of the United States Arbitration Act, binding on both federal and state courts, Robert Lawrence v. Devonshire, supra, when dealing with an arbitration provision evidencing a transaction involving commerce override a state's common law sovereign immunity. Different considerations would be involved if the contract in question did not evidence a transaction involving commerce, and we were therefore bound by Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), to follow state law."

Asiatic misconstrues Litton (ftn. br. p. 18) as holding that state law controlled with respect to a defense to an award. Not so. The Court there held that the issue was whether lack of authority to contract under state law constituted a ground "at law or equity for the revocation of any Contract" under the Federal Arbitration Act (p. 589 of 376 F. Supp.). So the Court was enforcing federal, not state, law and the case has nothing to do with closing the door to the federal courts.

It has been suggested by at least one New York court that B.C.L. Section 1312(a) merely suspends the right to enforce the contract while the offending corporation is in a state of non-compliance. Dixie Dinettes, Inc. v. Schaller's Furniture, Inc., 71 Misc. 2d 102, 104 (Civ. Kings 1972). That case did not involve a contract to arbitrate evidencing a transaction in commerce but if Section 1312(a) goes to the enforceability of the contract

as is suggested there, then federal law overrides Section 1312(a).

As was stated by this Court in Coenen v. R.W. Pressprich & Co., 453 F. 2d 1209, 1211 (2 Cir. 1972) cert den 406 U.S. 949 (1972):-

> "The sale of securities here constitutes a transaction relating to commerce for the purposes of the Arbitration Act. Once a dispute is covered by the Act, federal law applies to all questions of interpretation, construction, validity, revocability, and enforceability. Robert Lawrence Company v. Devonshire Fabrics, Inc., 271 F. 2d 402 (2d Cir. 1959), cert. granted, 362 U.S. 909, 80 S. Ct. 682, 4 L. Ed. 2d 618, dismissed under Rule 60, 364 U.S. 801, 81 S. Ct. 27, 5 L. Ed. 2d 37 (1960)."

Indeed, the New York Court of Appeals has ruled that where a contract falls under Chapter 1 of Title 9, the New York State Courts will not apply the New York statute of limitation but will apply Chapter 1 of Title 9 which does not authorize the stay of arbitration because the claim is time barred. Matter of Rederi (Dow Chem. Co.) 25 N.Y. 2d 576 (1970). Thus, even if the federal Courts were merely sitting as another State Court, as they do when they are enforcing State created rights, nonetheless the federal Courts would apply Matter of Rederi, and reject the application to this case of B.C.L. Sec. 1312(a).

If State law were permitted to frustrate the ability of a federal Court to enforce Chapter 1 of Title 9, we suggest that such State law is clearly unconstitutional. Congress, in adopting Chapter 1 of Title 9, intended clearly to exercise its full powers under the Commerce Clause; and even if it had not so intended, nonetheless a local, provincial law, interfering with contracts evidencing transactions in commerce would be violative of the Commerce Clause. That seems to be the square holding of Allenberg Cotton Co., Inc. v. Pittman, 419 U.S. 20, 33-4 (1974) where a state Court applied a state statute similar to B.C.L. Sec. 1312(a) to close the door to a foreign corporation seeking to enforce a contract involving commerce.

The Supreme Court summarized its holding, as follows (pp. 33-4):-

> "We hold only that Mississippi's refusal to honor and enforce contracts made for interstate or foreign commerce is repugnant to the Commerce Clause."

II

Jurisdiction arises under the laws of the United States; no local provincial law may thus be applied

The international contract involved herein between a national of the United States and a foreign national falls squarely under the Convention of 1958, which was ratified by Congress in 1970, and enacted together with supporting legislation as Chapter 2 of Title 9. The applicability of Chapter 2 to the contract at bar cannot be disputed.

The Convention of 1958 (9 U.S.C. Sec. 201) provides for the enforcement of foreign arbitral awards as well as the enforcement of contracts to arbitrate which fall under the Convention. It is true that the Commonwealth of the Bahamas has not ratified the Convention of 1958 (although Great Britain has), but that does not in any way impair or impinge upon the enforceability of the Convention to contracts between nationals of the United States such as Asiatic and nationals of the Commonwealth of the Bahamas such as Petco.

The Convention by its express terms permits only two reservations upon ratificaiton by a nation and Congress adopted both of those reservations. Thus, Section 3 of Article I of the Convention (9 U.S.C. Sec. 201) authorizes the following reservations:-

"3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."

Thus a nation may adopt a reservation which says that it will enforce foreign arbitral awards only if the foreign arbitral award was made in another nation which had adopted the Convention. But we are not concerned with a foreign arbitral award here and accordingly it is only the second reservation which applies to proceedings to enforce contracts.

The second reservation permits a nation to apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the nation in which the contract to arbitrate is sought to be enforced. There is nothing in that reservation which requires that the contract must arise between nationals of two nations which have adopted the Convention. And Congress in utilizing such reservations when it ratified the Convention stated with respect to enforcement of contracts to arbitrate only the following (ftn. 29, 9 U.S.C. §201):

"The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered

as commercial under the national law of the United States."

Thus Congress did not go beyond the reservation authorized by the Convention; it did not limit enforcement of contracts to arbitrate to contracts between nationals of nations both of which adopted the Convention. That is crystal clear both from Section 3 of Article I of the Convention and from the reservation adopted by Congress.

As was pointed out in Island Territory of Curacao v. Solitron Devices, Inc., 356 F. Supp. 1, 14 (S.D.N.Y. 1973) affd. 489 F. 2d 1313 (2 Cir. 1973) cert den. 416 U.S. 986 (1974) the purpose of Chapter 2 was to serve the best interests of Americans doing business abroad and to encourage the arbitration of disputes arising out of transactions by American business in foreign countries. That is precisely the case here.

We now turn to the jurisdictional basis for this proceeding under Chapter 2. 9 U.S.C. Sec. 203 expressly provides:

"An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States * * * shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy."

In short, jurisdiction of the District Court arises under the laws and treaties of the United States. Hence, the District Court had jurisdiction under both 28 U.S.C. Sec. 1331(a) (shorn of its $10,000 minimum requirement) and under 28 U.S.C. SEc. 1337 since the proceeding arises under an act of Congress regulating commerce.

There is no doubt that this is a proceeding falling under the Convention. 9 U.S.C. Sec. 202 describes what types of agreements fall under the Conention. Section 202 provides in pertinent part as follows:-

> "An arbitration agreement . . . arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement. . . arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States."

Under Section 202 all contracts which are described in 9 U.S.C. Sec. 2 fall under the Convention, providing of course they are not exclusively between nationals of the United States. There can be no question but that this contract involves foreign commerce and hence it falls directly under the Convention and is also a

contract described in 9 U.S.C. Sec. 2. Even if the contract were considered to be between nationals of the United States since it "envisages performance abroad", to wit, in either Venezuela, the Netherlands Antilles or Trinidad, it would fall under the Convention.

This contract is considered commercial under the national law of the United States. Thus, in Island Territory of Curacao v. Solitron Devices, Inc., 356 F. Supp. 1, 14 (S.D.N.Y. 1973) affd. 489 F. 2d 1313 (2 Cir. 1973) cert den. 416 U.S. 986 (1974) a contract under which a United States citizen was to lease certain buildings constructed by a foreign government was held to be commercial and thus fell within the Convention. Clearly a contract to sell and purchase No. 6 fuel oil is a fortiori commercial. It follows therefore that this proceeding falls under the Convention and hence arises under the laws and treaties of the United States.

In McCreary Tire & Rubber Co. v. Ceat, 501 F. 2d 1032 (3 Cir. 1974) the plaintiff, a Pennsylvania corporation, commenced an action against Ceat, an Italian corporation, in a state court of Pennsylvania, and obtained a foreign attachment against Ceat's assets held by Mellon Bank. The plaintiff claimed that Ceat had breached a distributorship contract between the parties.

Ceat removed the case to the District Court on the theory of diversity of citizenship, and moved for, inter alia, to dissolve the foreign attachment, and sought a stay of the action pending arbitration. The District Court denied all relief and the Court of Appeals reversed. The Court of Appeals said in reversing (p. 1037):-

> "The same statute provides that an action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States and that the district courts of the United States shall have original jurisdiction over such proceedings without regard to amount in controversy. 9 U.S.C. § 203. Although this case was removed on diversity grounds it was also removable on the authority of 9 U.S.C. § 205, which provides for such removal. Moreover 9 U.S.C. § 206 makes clear that the federal court may order arbitration of a dispute to which the Convention applies at the place agreed upon by the parties, within or without the United States."
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> * * *
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> "There is nothing discretionary about article II(3) of the Convention. It states that district courts shall at the request of a party to an arbitration agreement refer the parties to arbitration. The enactment of Pub. L. 91-368, providing a federal remedy for the enforcement of the Convention, including removal jurisdiction without regard to diversity or amount in controversy, demonstrates the firm commitment of the Congress to the elimination of vestiges of judicial reluctance to enforce arbitration agreements, at least in the international commercial context. See Scherk v. Alberto-Culver Co., 417 U.S. 506, n. 15, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974). It was error to deny the motion for a stay in disregard of the Convention.

> "Since we hold the treaty controls, it is unnecessary to decide whether in any event, since the complaint shows on its face that it involves a 'transaction involving [foreign] commerce', 9 U.S.C. § 2, the mandatory language of § 3 of the federal Arbitration Act of 1925 compels the same result. Cf. Merritt-Chapman & Scott Corp. v. Pennsylvania Turnpike Commission, supra, 387 F. 2d at772."

Certainly, when a proceeding arises under the laws of the United States, there is no room for the application of state law of any sort, unless Congress so indicates. Here, Congress has provided a comprehensive statutory scheme both in Chapters 1 and 2 of Title 9 and has expressly provided with respect to Chapter 2 (9 U.S.C. Sec. 208) that Chapter 1 applies to actions and proceedings brought under Chapter 2 to the extent that Chapter 1 is not in conflict with Chapter 2 or the Convention as ratified by the United States. This simply prevents the federal Courts from in any wise invoking doctrines of state law.

In Scherk v. Alberto-Culver Co., 417 U.S. 506, 519-20, in rejecting the application to international contracts involving securities of portions of the Securities Exchange Act of 1934 the Supreme Court said:-

> "For all these reasons we hold that the agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by the federal courts in accord with the explicit provisions of the Arbitration Act."

It is thus the explicit provisions of Title 9 which control and not some local, provincial law which would have the effect of frustrating the national policy set forth in the Arbitration Act. In any event, the law is crystal clear that state door closing statutes do not apply in the federal courts when jurisdiction is based on the laws or treaties of the United States. Holmberg v. Armbrecht, 327 U.S. 392 (1946); Fielding v. Allen, 181 F. 2d 163 (2 Cir. 1950) cert. den. 340 U.S. 817 (1950); McClure v. Borne Chemical Company, 292 F. 2d 824 (3 Cir. 1961); nor do they apply when a federal claim is asserted. Weisfeld v. Spartans Industries, Inc., 58 F.R. D. 570, 578 (SDNY 1972), and cases cited at p. 578.

III

New York State Courts would not apply B.C.L. Sec. 1312(a) to this proceeding

Basic to appellants's position is a contention that if this proceeding were brought in the State Courts, the State Courts would apply B.C.L. Sec. 1312(a). We submit that there is no authority to support that contention and that it is more likely that the New York State Courts would not apply B.C.L. Section 1312(a).

For purposes of this point, we will assume that a foreign corporation, not qualified to do business in New York but doing business in New York, seeks to compel, in the New York State Courts, arbitration under an arbitration agreement evidencing a transaction in commerce. We submit that the New York Courts would probably not apply B.C.L. Section 1312(a) and if they did so their action would be unconstitutional.*

The precedessor statute of B.C.L. Section 1312(a) was held not to be a bar to a proceeding to compel arbitration. Matter of Tugee Laces, Inc. (Muffet, Inc.), 297 N.Y. 914 (1948); Matter of Term.Maritima, 11 Misc. 2d 697 (Sup. New York 1957).

* See Allenberg Cotton v. Pittman, 419 U.S. 20, 33-4 (1974) Riegel Fiber Corp. v. Anderson Gin Co., 512 F. 2d 784, 792-3 (5 Cir. 1975); cf. Ivor B. Clark Co. v. Southern B. & I. D. Co., 399 F. Supp. 824 (S.D. Miss. 1974).

It may well be that the underlying bases for those holdings was that the predecessor statute spoke in terms of action while B.C.L. Sec. 1312(a) speaks in terms of both an action and a special proceeding. But we have been unable to find any case which holds or even intimates that Section 1312(a) overruled the holdings in Tugee and Maritima. The only expression of the impact of Section 1312(a) upon Tugee and Maritima which we have been able to find is set forth in 8 Weinstein-Korn-Miller, New York Civil Practice Section 7502.09, pp. 75-51, 75-52. There the learned editors said as follows:

> "It is very doubtful that the Legislature had in mind so harsh a sanction for the failure to obtain authority to do business in New York, and prior law should probably be followed notwithstanding the language of the Business Corporation Law."

We suggest that in the absence of any authority in conflict with Tugee and Maritima and in view of all of the deference which is paid by the New York State Courts to Weinstein-Korn-Miller, this Court should not anticipate that the New York Courts would find that Section 1312(a) has overruled prior law.

Indeed, Matter of Rederi (Dow Chem. Co.) supra, 25 N.Y. 2d 576 (1970) indicates that where a contract involving commerce is concerned, the New York Courts will not apply any New York law but will apply only federal law. Under New York law, if the claim to be arbitrated is barred by limitations of

time, the New York Courts will stay arbitration. But, said the Court of Appeals, in Matter of Rederi, where the contract involves commerce the New York courts will not stay the arbitration even though the claim is time barred under New York law, because Title 9 does not authorize a stay of arbitration under such circumstances.

Accordingly, we suggest that at least with respect to contracts involving commerce, Matter of Rederi, supra, 25 N.Y. 2d 576 is conclusive that the New York State Courts will not apply Section 1312(a) even if the application to compel arbitration were brought in the State Courts by a foreign, non-speaking corporation, doing business in New York.

The ruling of the New York court of Appeals in Matter of Rederi, points up the essential difference between a proceeding brought to enforce a contract evidencing a transaction in commerce where jurisdiction is based on diversity of citizenship, and a case which involves state created rights where jurisdiction is based upon diversity of citizenship. Where the contract involves commerce the New York statute of limitation is not even applied in the New York State courts in view of Title 9. On the other hand, in a diversity case brought to enforce a state created right, the federal courts must apply the state statute of limitation. Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

Although Section 1312(a) does not by express language bar its application to international contracts evidencing transactions in commerce, nonetheless we think it would be so construed in view of Title 9. Thus, in determining whether or not a foreign corporation is doing business within the State of New York the New York Courts have very carefully excluded from their consideration any acts which fall within interstate commerce. See e.g. Opticians Association v. Guild of Prescription Opticians, 49 App. Div. 2d 370, 374 N.Y.S. 2d 451 (3d Dept. 1975); International Textbook Co. v. Tone, 220 N.Y. 313 (1917); Miller v. Surf Props., Inc., 4 N.Y. 2d 475 (1958); International Fuel & Iron Corp. v. Donner Steel Co., 242 N.Y. 224, 231 (1926); Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 267 (1917).

Accordingly, we submit that there is no authority whatsoever that the New York State Courts would apply Section 1312(a) in a proceeding to compel arbitration of a contract evidencing commerce, such as the contract at bar. We submit therefore that the federal Courts should not apply Section 1312(a) especially since federal rights are here being asserted and indeed jurisdiction is predicated under the laws and treaties of the United States as well as on diversity of citizenship.

In conclusion we think that the language of the United States Supreme Court in Scherk v. Alberto-Culver Co. 417 U.S. 506, 516-17 (1974) is highly apposite.

> "A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. In the present case, for example, it is not inconceivable that if Scherk had anticipated that Alberto-Culver would be able in this country to enjoin resort to arbitration he might have sought an order in France or some other country enjoining Alberto-Culver from proceeding with its litigation in the United States. Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no man's land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."

Conclusion

The order appealed from should be affirmed in all respects, with costs, and the proceeding remanded to the District Court for determination of the only two questions which a federal Court may consider:

a) is there a contract to arbitrate;

b) has Asiatic refused to arbitrate?

c) what are the arbitrable issues?

Respectfully submitted,

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Services of three (3) copies of
the within Brief is
hereby admitted this 5th day
of August, 1976
Edward Stevens & Brown
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